



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

March 31, 2006

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-04

Mr. Jon Ponder  
Treasurer  
Tancredo for Congress Committee, Inc.  
P.O. Box 3756  
Littleton, CO 80121-3756

Dear Mr. Ponder:

We are responding to your advisory opinion request on behalf of Tancredo for Congress Committee, Inc. ("TFC"), the principal campaign committee for Representative Thomas Tancredo, concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to certain activities by Representative Tancredo and TFC on behalf of Defend Colorado Now ("DCN"), a State ballot initiative committee. The Commission concludes that while donations from TFC to DCN are generally permissible, donations in the proposed amounts would constitute "financing" of DCN by TFC for the purposes of 2 U.S.C. 441i(e)(1) and 11 CFR 300.2(c). TFC may produce and disseminate communications in which Representative Tancredo endorses the ballot initiative supported by DCN. Any polling data DCN gives to TFC would be an in-kind contribution and would be subject to the limitations and prohibitions of the Act.

***Background***

The facts presented in this advisory opinion are based on your letters received on November 21, 2005 and January 31, 2006, and a phone conversation on February 6, 2006.

Representative Tancredo is a member of Congress representing the Sixth Congressional District of Colorado and is a candidate for reelection in 2006. He is

closely identified with the issue of immigration reform and is the Chairman of the Congressional Immigration Reform Caucus in the U.S. House of Representatives.

DCN is a registered State committee established on February 12, 2004 for the purpose of qualifying and advocating for a Colorado ballot initiative that would restrict certain State services to persons lawfully present in the United States. DCN intends to collect sufficient signatures to qualify the initiative for the November 7, 2006 election. It will solicit and accept funds that are permitted under Colorado law, but that are in excess of the amounts permitted and from sources prohibited by the Act. Should the initiative successfully qualify for the ballot, DCN will spend funds to advocate for the passage of the initiative, including paying for mail and media advertising in Representative Tancredo's district. DCN does not intend to support or oppose Federal or non-Federal candidates on the November 7, 2006 ballot.

Representative Tancredo intends to endorse the ballot initiative and use campaign funds from TFC to run newspaper, radio, and television advertisements in his Congressional District publicizing his endorsement. No other entity, including DCN, will pay for these advertisements. Representative Tancredo and TFC anticipate receiving polling data from DCN, and plan to use the polling data to craft these endorsement messages. Representative Tancredo will not solicit funds on behalf of DCN in these endorsements or in any other manner.

TFC would like to make a donation to DCN. Your request presents three possible scenarios. In the first alternative, TFC would donate either \$50,000 or 50% of the total receipts of DCN at the time of the contribution, whichever is less. The second alternative would limit the donation to \$50,000 or 25% of total receipts of DCN at the time of the donation, whichever is less. Finally, under the third alternative, TFC would not donate any funds directly to DCN, but would instead pay up to \$50,000 directly to signature vendors for their services in providing signatures to DCN to qualify the initiative.

### ***Questions Presented***

1. *May TFC donate campaign funds to DCN?*
2. *Would Representative Tancredo directly or indirectly establish, finance, maintain, or control DCN if:*
  - (a) *TFC donates to DCN the lesser of \$50,000 or 50% of DCN's total donations?*
  - (b) *TFC donates to DCN the lesser of \$50,000 or 25% of DCN's total donations?*
  - (c) *TFC pays vendors up to \$50,000 for providing signatures to DCN to qualify its initiative for the ballot?*
3. *May TFC pay for communications in which Representative Tancredo endorses the ballot initiative supported by DCN?*
4. *May TFC accept opinion polling data from DCN?*

***Legal Analysis and Conclusions******Question 1. May TFC donate campaign funds to DCN?***

Yes, TFC may donate campaign funds to DCN. The Act lists six categories of permissible uses of contributions received by a Federal candidate, including “otherwise authorized expenditures in connection with the campaign for Federal office of the candidate.” 2 U.S.C. 439a(a)(1); *see also* 11 CFR 113.2(a). Representative Tancredo’s support for immigration reform is a part of his reelection campaign and is an issue with which he is closely identified. His donation of campaign funds to a ballot initiative committee that shares his policy goals regarding this issue is considered “in connection with [his] campaign for Federal office.” Thus, these donations are permissible under 2 U.S.C. 439a(a)(1). *See* Advisory Opinion 2004-29 (Akin). The proposed activity may also fall within other permitted uses of contributions enumerated by 2 U.S.C. 439a(a), including the use of contributions “for any other lawful purpose” under 2 U.S.C. 439a(a)(6).

***Question 2. Would Representative Tancredo directly or indirectly establish, finance, maintain, or control DCN if (a) TFC donates to DCN the lesser of \$50,000 or 50% of DCN’s total donations; or (b) TFC donates to DCN the lesser of \$50,000 or 25% of DCN’s total donations; or (c) TFC pays vendors up to \$50,000 for providing signatures to DCN to qualify its initiative for the ballot?***

The Act states that any entity “directly or indirectly established, financed, maintained, or controlled” by a Federal candidate or officeholder shall not solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office or any election other than an election for Federal office, unless those funds comply with the contribution limits and source prohibitions of the Act. 2 U.S.C. 441i(e)(1). To determine whether a Federal candidate or officeholder directly or indirectly established, financed, maintained, or controlled another entity the Commission applies the factors set forth in 11 CFR 300.2(c)(2). Specifically, the Commission examines the ten factors identified in 11 CFR 300.2(c)(2)(i) through (x), as well as any other relevant factors, in the context of the overall relationship between the Federal candidate or officeholder and the entity. *See* 11 CFR 300.2(c)(2).

Under the facts presented, the key factor is whether TFC will provide funds “in a significant amount” to DCN.<sup>1</sup> 11 CFR 300.2(c)(2)(vii). The Commission has approached the question of what constitutes a significant amount on a case-by-case basis in view of all the relevant circumstances. It has stated that “amounts that are so large or... that comprise such a substantial percentage of the organization’s receipts” would be considered “financing” a committee under 11 CFR 300.2. Advisory Opinions 2004-29, n. 4 (Akin), 2004-25 (Corzine).

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<sup>1</sup> The Commission notes that while other factors may also indicate that DCN is directly or indirectly established, financed, maintained, or controlled by Representative Tancredo, your request does not provide sufficient information for the Commission to apply these factors in the context of this Advisory Opinion.

You have not proposed the donation of a specific dollar amount to DCN. Instead, your proposal is that TFC will donate a specific percentage of DCN's total receipts (either 25% or 50%), up to \$50,000. Therefore, the only inquiry the Commission can perform is to determine whether the proposed percentage is "a significant amount" under 11 CFR 300.2(c)(2)(vii).

The Commission will examine the percentage of TFC's donation compared to the total donations received by DCN under each of the three alternatives proposed in your request in the context of the overall relationship between TFC and DCN to determine whether TFC's proposed donation to DCN is "in a significant amount" under 11 CFR 300.2(c)(2)(vii).

A. Alternative One - TFC donates to DCN the lesser of \$50,000 or 50% of DCN's total donations.

Alternative One proposes a donation from TFC to DCN in an amount up to 50% of the total receipts of DCN at the time of the donation. A donation of 50% of an organization's total receipts must be considered a "significant amount." For the Commission to find otherwise would essentially rewrite the regulation to require that a "majority" of an entity's funds come from a single source before that source would be deemed to have financed the entity. Accordingly, a donation by TFC that represents 50% of DCN's total funds is a "significant amount" that would result in TFC "financing" DCN for the purpose of 11 CFR 300.2(c).

B. Alternative Two - TFC donates to DCN the lesser of \$50,000 or 25% of DCN's total donations.

Alternative Two proposes a donation from TFC to DCN in an amount up to 25% of the total receipts of DCN at the time of the donation, which must be examined in the context of the overall relationship between TFC and DCN to determine whether this donation is a significant amount under 11 CFR 300.2(c)(2)(vii).

DCN was established on February 12, 2004 and has not been active on any issue other than advocating for the proposed ballot initiative. TFC seeks to donate a substantial amount of money to support DCN's sole mission of placing this initiative on the 2006 ballot and urging voters to support it. Through the fourth quarter of 2005 DCN received donations of \$9,285.40. DCN also received pledges for an additional \$45,500 but these funds have not yet been received as of the date of your request. TFC has indicated that it would like to donate up to \$50,000. This amount of money would represent substantial "seed money" for DCN and would result in DCN depending in large part on TFC for its initial existence.

DCN will also share with TFC both its polling data and general "campaign strategy." Representative Tancredo also intends to use his own campaign funds to create and distribute advertisements to endorse the initiative. He supported an identical

initiative in the past and is closely identified with this issue on a State-wide and national basis. Representative Tancredo will appear on the same ballot as the initiative and has made the issue of immigration reform a part of his reelection campaign.

In the context of the overall relationship between TFC and DCN, the Commission concludes that the donation of 25% of DCN's total receipts by TFC is a significant amount of funds that would result in TFC "financing" DCN for the purpose of 11 CFR 300.2(c).

C. Alternative Three - TFC pays vendors up to \$50,000 for providing signatures to DCN to qualify its initiative for the ballot.

You propose that TFC pay an amount up to \$50,000 directly to signature vendors for their services in providing signatures to DCN to qualify the initiative for the November 7, 2006 ballot. Section 300.2(c)(2)(vii) states that the provision of funds in a significant amount "through direct or indirect payments for administrative, fundraising, or other costs" is relevant for determining whether committees are directly or indirectly established, financed, maintained, or controlled by a Federal candidate or officeholder. Paying vendors who gather signatures for DCN would constitute providing funds through "indirect payments" for the "other costs" of DCN. Therefore, the legal effect of paying up to \$50,000 to these vendors on behalf of DCN is identical to donating up to \$50,000 to DCN. As discussed above, such a donation is a permissible use of campaign funds, but the donation may result in TFC financing DCN if that donation is a "significant amount" of DCN's total receipts. The determination of whether the amount is significant may be dependent to some extent on what percentage of DCN's total receipts the donation by TFC represents. See analysis of questions 2(a) and 2(b), above.

*Question 3. May TFC pay for communications in which Representative Tancredo endorses the ballot initiative supported by DCN?*

Yes, TFC may use campaign contributions to pay for communications in which Representative Tancredo endorses the ballot initiative supported by DCN. As stated above, contributions may be used by candidates "for otherwise authorized expenditures in connection with the campaign for Federal office" of that candidate. 2 U.S.C. 439a(a)(1). The Commission has previously determined that an advertisement in which a candidate endorses a ballot initiative on an issue with which he is associated is an expenditure in connection with a campaign for Federal office. See Advisory Opinion 2004-29 (Akin). In this case, Representative Tancredo is closely identified with the issue of immigration reform. Therefore, communications in which he endorses a ballot initiative addressing this issue would be permissible uses of campaign contributions under 2 U.S.C. 439a(a)(1). See also 11 CFR 113.2(a).

*Question 4. May TFC accept opinion polling data from DCN?*

Yes, TFC may accept opinion polling data from DCN subject to the prohibitions and limitations of the Act and Commission regulations.

A contribution includes “anything of value” given by any person for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). Specifically, 11 CFR 106.4(b) states that the purchase of opinion poll results by a person not authorized by a candidate to make expenditures and the subsequent acceptance of the poll’s results by a candidate or a candidate’s authorized committee is an in-kind contribution by the purchaser to the candidate, and an expenditure by the candidate. Because Representative Tancredo and TFC will “have access” to DCN’s polling data, and because TFC will use this data in creating advertisements it will run, TFC’s acceptance of DCN’s poll results is an in-kind contribution from DCN to TFC. However, if the poll results were to be made public prior to receipt by TFC, and were made public without any request, authorization, prearrangement, or coordination between TFC and DCN, then there would not be an in-kind contribution. *See* 11 CFR 106.4(c).

This in-kind contribution is subject to the source prohibitions and amount limitations of the Act. You indicate that to the best of your knowledge, DCN is not a prohibited source under the Act, such as a corporation. Therefore, TFC may receive an in-kind contribution from DCN subject to the limitations of 2 U.S.C. 441a(a)(1)(A) and 11 CFR 110.1(b)(1). The amount of the contribution is the amount that would be attributed to TFC under 11 CFR 106.4(e). The precise amount of the in-kind contribution must also take into account the length of time between DCN’s receipt of the poll results and TFC’s receipt of those results, pursuant to 11 CFR 106.4(g).<sup>2</sup> *See* Advisory Opinion 1990-12 (Strub).

The Commission expresses no opinion regarding whether the activities you propose are permissible under Colorado law.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Michael E. Toner  
Chairman

Enclosures (AOs 2004-29, 2004-25, 1990-12)

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<sup>2</sup> The amount of a contribution received and expenditure made by a candidate or committee receiving poll results would be 50 percent of the original amount if received during a period of 16 to 60 days after the initial recipient obtained the results, five percent of the original amount during a period 61 to 180 days after the initial receipt, and zero if after 180 days. *See* 11 CFR 106.4(g).

**DISSENTING OPINION IN ADVISORY OPINION 2006-04****OF****CHAIRMAN MICHAEL E. TONER  
AND COMMISSIONER HANS A. VON SPAKOVSKY**

We write separately to express our disagreement with the approach taken in the majority opinion. We would have preferred to answer this advisory opinion request by concluding that regardless of whether a state ballot initiative committee is “financed” by a Federal candidate or officeholder, state ballot initiative committees are not restricted by the soft money restrictions of federal campaign finance law because their activities are not in connection with an election for office within the meaning of 2 U.S.C. § 441i(e). Thus, approaching the issues this way, the question of whether Defend Colorado Now (“DCN”) is “financed” by the Tancredo for Congress Committee (“TFC”) is irrelevant. We are also concerned with our colleagues’ method of analysis in examining the question of “financing.” We hope that the Commission will have occasion to revisit these issues in the future.

**I. THE SOFT MONEY RESTRICTIONS IN SECTION 441i(e) ARE LIMITED TO  
ACTIVITIES IN CONNECTION WITH CANDIDATE ELECTIONS**

TFC requested an advisory opinion from the Commission to seek assurances that certain contributions to DCN would not violate 2 U.S.C. § 441i(e)(1) or other provisions of the Federal Election Campaign Act of 1971 as amended (the “Act”).<sup>3</sup> The requester sought “guidance as to whether the amount of the contribution both in nominal and percentage terms is not so large as to consider DCN being ‘financed’ by Congressman Tancredo” within the meaning of section 441i(e)(1). *See* Advisory Opinion Request of Jon Ponder, Treasurer, Tancredo for Congress Committee, Inc., November 18, 2005. The request noted that “DCN will solicit funds in excess of amounts permitted and from sources prohibited by the Act (‘soft-money’).” *Id.* Subsequent correspondence indicated that Congressman Tancredo had no plans to solicit donations to DCN. *See* Correspondence from Jon Ponder to Rosemary C. Smith, January 26, 2006.

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<sup>3</sup> We agree with our colleagues’ decision that the proposed donations are permissible under 2 U.S.C. § 439a(a)(1) and (6).

The threshold legal question in determining whether the fundraising restrictions of section 441i(e) apply is whether the activities in question are in connection with an election. Sections 441i(e)(1)(A) and (B) prohibit Federal candidates and officeholders, and entities directly or indirectly established, *financed*, maintained or controlled by a Federal candidate or officeholder, from soliciting, receiving, directing, transferring, or spending funds outside the prohibitions and limitations of the Act. However, those provisions apply only with respect to activities conducted “in connection with an election for Federal office” or “in connection with any election other than an election for Federal office.”

We believe, as a matter of law, that state ballot initiatives and referenda are not elections for office under 2 U.S.C. § 441i(e)(1). The phrases “election for Federal office” and “election other than an election for Federal office” unambiguously refer to candidate elections for public office. This view was recently set forth in Advisory Opinion 2005-10, Concurring Opinion of Vice Chairman Toner and Commissioner Mason. There, it was noted that “the legislative history supports this interpretation of Section 441i(e). In debating the Bipartisan Campaign Reform Act of 2002 (‘BCRA’), not a single Member of Congress, including the legislation’s sponsors, indicated that the soft-money ban would apply to initiatives and referenda. Moreover, Members of Congress who voted for BCRA, including House Minority Leader Nancy Pelosi (D-CA), filed comments in this proceeding indicating that it was not their understanding that 441i(e)’s soft money restrictions would apply beyond the candidate elections to ballot measure activities.”

Therefore, based on the plain meaning of section 441i(e) and the statute’s legislative history, the state ballot initiative-related activities of DCN, even if “financed” by TFC, are not subject to the soft money restrictions of the Act.

## II. ANALYZING “FINANCING” UNDER SECTION 441i(e)

The foregoing discussion notwithstanding, we also believe the Commission’s method of analysis with regard to the matter of “financing” takes an insufficiently comprehensive view of the totality of the circumstances surrounding the proposed donations. The application of that analysis to the proposed donation in the amount of 25% of receipts reaches an incorrect conclusion.

The Act does not define the terms “establish, finance, maintain, or control.” *See* 2 U.S.C. § 441i(e)(1). The Commission’s regulations, at 11 CFR § 300.2(c)(2), state that

To determine whether a sponsor directly or indirectly established, finances, maintains, or controls an entity, the factors described in paragraphs (c)(2)(i) through (x) of this section must be examined in the context of the overall relationship between sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity.



The regulation then lists 10 factors, but notes that they are not exclusive. In other words, the regulations create a “totality of the circumstances” test.

#### A. Proposed Alternative One

With respect to Alternative One, the majority opinion contains no examination of the relevant facts and circumstances. The Commission simply concludes that “[a] donation of 50% of an organization’s total receipts must be considered a ‘significant amount.’” While we agree with the result here, we believe that 11 CFR § 300.2(c)(2) requires an actual examination of the surrounding facts and circumstances. The two organizations (TFC and DCN) are, and would continue to be, independent of each other, with distinct leadership not indicative of a formal or ongoing relationship.<sup>4</sup> DCN would like to share polling data and campaign strategy with TFC. Representative Tancredo is closely associated with the issues promoted by DCN, intends to endorse the ballot initiative, and will appear on the same ballot as the initiative. Thus, the “overall relationship” between TFC and DCN is one in which the former has an interest in the latter’s success. In light of these facts, this donation may represent much-needed “seed money” for DCN.

The facts provided in the request indicate that through the fourth quarter of 2005, DCN had received donations of \$9,285.40, plus pledges for an additional \$45,500. Whether these pledges have been realized is unknown. A donation of 50% of DCN’s total actual receipts as of the time of the request, would equal \$4,642.70. While this is not an especially large amount of money, it may represent a substantial sum for a nascent organization, especially if this donation is required to fund efforts to collect the additional \$45,600 in pledges. The facts set forth above and the overall relationship between TFC and DCN indicate that the proposed donation of 50% of receipts *could be* a “significant amount” that results in “financing” for purposes of 2 U.S.C. §441i(e)(1) and 11 CFR § 300.2(c).

However, we disagree with our colleagues that “[a] donation of 50% of an organization’s total receipts *must be* considered a ‘significant amount’” (emphasis added). *See* Advisory Opinion 2006-04, at page 4. 11 CFR § 300.2(c) does not impose any *per se* thresholds, but rather, requires a full examination of the relevant facts. If, for example, DCN receives the additional \$45,600 in pledges, the \$4,642.70 contributed by Representative Tancredo may not be a “significant amount” in comparison to the total of \$59,406.10 raised by DCN. Under such circumstances, Representative Tancredo’s donation would represent less than 8% of DCN’s total funding.

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<sup>4</sup> The Advisory Opinion Request states that “Congressman Tancredo did not establish and will not control DCN.”

B. Proposed Alternative Two

The Commission examines the overall relationship of TFC and DCN for purposes of analyzing Alternative Two, and concludes that a donation from TFC to DCN in an amount up to 25% of the total receipts of DCN at the time of the donation is a “significant” amount that would result in TFC “financing” DCN for purposes of 2 U.S.C. § 441i(e)(1) and 11 CFR § 300.2(c). We disagree with this conclusion.

DCN has received donations of \$9,285.40. A donation of 25% of DCN’s total actual receipts as of the time of the request would equal \$2,321.25. In light of the overall relationship between TFC and DCN, as examined above, we do not agree that this relatively modest amount constitutes TFC “financing” DCN. This amount is less than half the permissible annual individual contribution limit to a federal political action committee, and would be less than 4% of the total funding collected by DCN if all its pledges are fulfilled.

We do not read our colleagues’ opinion to stand for the proposition that a donation of 25% of total receipts must always lead to a finding that one entity is financed by another. Rather, “the context of the overall relationship between TFC and DCN” appears to be the crucial predicate for their conclusion. *See* Advisory Opinion 2006-04, at page 5. Regardless, we hope the Commission soon has an opportunity to revisit soon the issues raised in this advisory opinion so that it can provide further guidance to the regulated community.

May 16, 2006

\_\_\_\_\_(signed)\_\_\_\_\_  
Michael E. Toner, Chairman

\_\_\_\_\_(signed)\_\_\_\_\_  
Hans A. von Spakovsky, Commissioner